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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

Nos. 808 and 822

FEDERAL POWER COMMISSION, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY, and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 808
CITY OF COLTON, CALIFORNIA, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY, and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 822

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. A, petn., pp. 17-36) is reported at 310 F.2d 784.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions.

QUESTIONS PRESENTED

The Public Utilities Commission of the State of California (California) respectfully submits that, more appropriately stated than in the petitions herein, the questions presented are:

1. Does the record support Federal Power Commission's (FPC) finding that there is some out-of-state energy in the sale made at wholesale by Southern California Edison Company (Edison) to the City of Colton (Colton)? This basic jurisdictional issue of fact was reserved by the Court below, which assumed for the purpose of its decision that it was determined in favor of FPC. (310 F.2d 784, 786, footnote 2.)

2. Assuming that this Court should find that the record contains competent and substantial proof that there is some out-of-state energy in the sale made at wholesale by Edison to Colton, is FPC's jurisdiction precluded by Section 6 of the Boulder Canyon Project Act of 1928, which confers jurisdiction on the Secretary of the Interior, in the absence of state regulation,

over rates for the sale of electric energy originating at power installations constructed under that Act? This issue was reserved by the Court below, which assumed for the purpose of its decision that it was determined in favor of FPC. (310 F.2d 784, 786, footnote 2.)

3. Assuming that both of the foregoing questions are found by this Court to have been properly decided by FPC, has FPC jurisdiction under Section 201(b) of the Federal Power Act "where, as here, the original sale for interstate transmission is under federal control and no other state is affected in any way by [California's] regulation of the subsequent transaction?" (310 F.2d 784, 794.)

4. Assuming that all of the foregoing questions are found by this Court to have been properly decided by FPC, has FPC jurisdiction of sales at wholesale in interstate commerce made wholly over nonjurisdictional (i.e., exempt from FPC jurisdiction) local distribution facilities? This question was not passed upon by the Court of Appeals for the Ninth Circuit.

A finding adverse to petitioners on any one of these four questions is sufficient to sustain the judgment of the Court below.

The following additional questions, though not finally determinative of regulatory jurisdiction, were raised below but did not have to be decided by the Court of Appeals. They would remain to be considered only if the judgment below were to be set aside:

5. Whether FPC erred in holding that it had no discretion to abstain from taking jurisdiction over

de minimis sales of electric energy in interstate commerce.

6. Whether FPC erroneously held that Section 205(d), 16 U.S.C. 824d, of the Federal Power Act required that Edison refund certain charges collected from Colton.

7. Whether FPC acted arbitrarily and in excess of its lawful authority and discretion in ordering the effective filing date for Edison's rate schedule to be retroactive to 1954.

8. Whether FPC erred by requiring the filing of rates that are unreasonable, unfair, discriminatory, and preferential, in violation of Section 205 of the Federal Power Act, and which are confiscatory, in violation of the Fifth Amendment of the United States Constitution.

9. Whether FPC erred in refusing, upon application for rehearing, to receive and consider evidence that the basis asserted for federal jurisdiction no longer existed and rendered the case moot.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act (41 Stat. 1063, as amended, 16 USC 791-825r) are set forth in FPC's petition herein. (App. C. pp. 44-48.) A pertinent provision of the Natural Gas Act (52 Stat. 821, as amended, 15 USC 717-717w) is also set forth in FPC's petition herein. (App. C, p. 48.) Another

equally pertinent provision of the Natural Gas Act is Section 1(c) 15 USC 717(c).

Section 6 of the Boulder Canyon Project Act of 1928, 45 Stat. 1057, 1061-1062, 43 USC Sec. 617(e) is set out in Colton's petition. (App. A, p. 11.)

STATEMENT

FPC's statement (Petn. pp. 2-8) is adopted by Colton. (Petn. p. 3.) It is factually correct with the exception of the following errors or omissions:

1. FPC erroneously states that Edison obtains energy from Davis Dam in Nevada. Edison has obtained no energy from Davis since April 30, 1956.

2. FPC has failed to advise the Court that matters which have arisen since the decision have made FPC's assertion of jurisdiction moot. The Metropolitan Water District (MWD) now requires its entire entitlement from Hoover for its own use; therefore its has no "unused" energy to turn back to the United States for sale to Edison, but requires large amounts of supplemental energy from Edison to meet its requirements. This reversal of the flow of energy precludes receipt by Edison of Hoover energy at Hayfield for the foreseeable future, barring emergency or disaster. (R. 1944; R. 1967.)

FPC mentions a "third route" "by which out-of-state energy may reach the City of Colton," and describes it as running "from Hoover to Chino, to Highgrove and thence to Colton". (Petn. p. 4.) There was

no testimony from FPC's witness or anyone else that Colton ever received energy over the so-called "third route." However, the line between Edison's Chino and Highgrove stations is no longer in service, so even the possibility of a third route is moot.

3. FPC has failed to advise the Court that Edison serves no customers outside of the State of California.

4. FPC has failed to advise the Court that the portions of Hoover power plant in Nevada assigned by the United States for the use of Edison are physically and electrically separated from those portions which are assigned by the United States for the use of the States of Arizona and Nevada, and there are no interconnections of Edison's transmission lines with any in Nevada or Arizona.

5. FPC has failed to advise the Court that Edison serves Colton from nonjurisdictional distribution facilities.

6. FPC has failed to advise the Court, as it ignored the fact in the proceeding before it, that Colton is supplied by Edison's nonjurisdictional (California) sources of generation which at all times are and have been far more than adequate to serve Colton's load.

7. FPC has failed to advise the Court that during 1958 only about 6% of Edison's energy was generated out of California, and that only about 1% was delivered to Edison over the MWD connection at Hayfield upon which FPC's claim to jurisdiction rests. (R. 401; 1534.) In 1959, this amount dropped to one-fifth of one percent. (R. 892-893.)

ARGUMENT

THE WRIT SHOULD BE DENIED

At the outset, California takes exception, because unsupported by facts either within or without the record, to the remarks of FPC concerning the "rapidly increasing integration of the nation's power resources" (Petn. p. 9) and "the rapid integration of the nation's power grid . . . [which] is erasing the significance of state boundaries, ..." (Petn. p. 14.) The *voluntary* integration (Sec. 824(a) Federal Power Act) of some few power companies is proceeding slowly and cautiously. Technological problems are presently being explored by committees of FPC, which include representatives of public and private power, members of certain State commissions including California, and various federal agencies, and there is no rush to integrate while these remain unresolved. The jurisdictional significance of state boundaries may, it is true, be constitutionally "erased" by appropriate legislation, but not by administrative erosion. As the Court below found, Congress has not given FPC jurisdiction over "an interstate sale for resale where, as here, the original sale for interstate transmission is under federal control and no other state is affected in any way by regulation of the subsequent transaction." (310 F.2d 784, 794.)

California also takes exception to FPC's potentially misleading, entirely self-serving and gratuitous statement that "more than half of the approximately 1,500 wholesale sales now covered by rate schedules on file

with the Commission pursuant to the Power Act are for sales at wholesale made after a Commission-regulated sale at the boundary of or within the same State." (Petn. p. 15.) Nothing in the record supports this statement. Even if it were true, such sales may involve conflicting State interests, which would impose an undue burden on interstate commerce, unlike the situation before this Court. Or, such schedules may have been filed in acquiescence with FPC's mistaken notions of the extent of its jurisdiction. Such filings confer no jurisdiction where none exists.

California also takes exception to FPC's statement that a case-by-case determination of the national interest "'can only create troublesome problems' leading to complications and delay." (Petn. p. 15.) While the administration of justice is a troublesome problem, jurisdiction is not determined by administrative convenience. As a matter of fact, the necessary case-by-case determination of the presence or absence of jurisdictional energy in a wholesale sale presents a much more complicated problem, as the record discloses.

Contrary to FPC's statement (Petn. p. 9) adoption of the national interest standard of the Court of Appeals would not impede FPC's effective regulation of interstate wholesale sales of electric energy. Rather it would aid FPC by limiting its "nigh interminable" reviews (*Atlantic Refining Co. v. Public Service Commission of the State of New York* (1959), 360 U.S. 378, 389) to those sales at wholesale in interstate commerce in which there is a national interest. Those

few sales of purely local interest, such as those in the case at bar, would be excluded.

California takes vigorous exception to FPC's statement (Petn. p. 15) that "the Ninth Circuit's approach would leave to the States matters with which they cannot effectively deal." California has dealt effectively with Edison's rates since 1912. Petitioners do not deny that Edison's wholesale rates, fixed by California, are just, reasonable and nondiscriminatory. Neither do they assert that there is any national interest in Edison's wholesale rates to Colton. "A quarter-century of technological improvement and industry development" (FPC petn. p. 15) has not resulted in the creation of any national interest in Edison's wholesale rates, which concern only California, and which are effectively regulated by California.

I. THERE IS NO CONFLICT WITH OTHER DECISIONS.

FPC argues (Petn. p. 10) that this Court should now give a "restricted reading" to its decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), although it concedes that the legislative history of both the Federal Power and Natural Gas Acts shows that the "primary purpose of Congress" was to close the "Attleboro gap". Petitioners, in other words, admit that it was the intent of Congress to confer jurisdiction upon FPC of those matters which the states, because of conflicting state interests, were constitutionally disabled from

regulating. FPC goes on, however (Petn. p. 10), to allege in effect that the *Court* has enlarged upon this limited grant of jurisdiction by holding that *all* wholesale sales of electric energy and natural gas in interstate commerce were to be regulated by FPC, not "only . . . those matters which are not subject to regulation by the States." (Sec. 201(a) Federal Power Act.) In support of its allegation of judicial encroachment upon the legislative function, FPC cites, among others, *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498 (1941) and *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464 (1949), both of which concerned accounting and securities and not sales at wholesale. It also cites *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953). These, as the Court below said, "are distinguishable because they all involved a possible conflict of interest among two or more states without any federal regulatory authority in a position to resolve such conflicts by controlling the equitable distribution of either the power supply or the power charges among the states concerned." (310 F.2d 791.)

In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), the Court was concerned with federal control over producer sales for resale for transmission to and consumption in a state other than the state of production. In the case at bar, such federal control of the rates for the small amount of energy which Edison may buy from the United States at Hoover is supplied by the contract with the United States.

Wisconsin-Michigan Power Company v. Federal Power Commission, 197 F.2d 472 (CA 7, 1952), *cert. den.* 345 U.S. 934 (1953) and *Pennsylvania Water and Power Co. v. Federal Power Commission*, 343 U.S. 414 (1952), also involved a potential conflict of state interests, since they concerned the first sale for resale of energy generated in a state other than the state of consumption. *Colorado-Wyoming Gas Co. v. Federal Power Commission*, 324 U.S. 626 (1945), also presented a "gap", since the gas sold at wholesale was thereafter resold in more than one state.

Hartford Electric Light Co. v. Federal Power Commission, 131 F.2d 953 (CA 2, 1942) did not involve a sale at wholesale, but FPC's jurisdiction for accounting purposes over local distribution facilities. This Court, in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945), commenting on *Hartford*, arrived at an opposite conclusion, stating that it was "hard for us to believe that Congress meant us to read 'shall have jurisdiction' [over local distribution facilities] where it had carefully written 'but shall not have jurisdiction.'" (324 U.S. 515, 528-9.)

Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507 (1947) and *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951) involved the states' power to regulate industrial sales. In the former, this Court again emphasized that federal regulation was not meant to cut down state power, but to

supplement and reinforce it *in the gap* created by prior decisions. (332 U.S. 507, 517-518.)

It is obvious that the foregoing cases present no conflict with the decision of the Court below since this Court has not passed upon a wholesale sale where the initial sale at wholesale is subject to federal regulation, and where the state effectively regulates subsequent sales for resale and for consumption within the same state by a company whose customers are all in that state.

The only case cited by petitioners which might have involved such a situation is that of *Wisconsin v. Federal Power Commission,* 201 F.2d 183, (CADC 1952) *cert. den.* 345 U.S. 934 (1953). There the Circuit Court relied upon *Wisconsin-Michigan Power Co. v. Federal Power Commission, supra,* stating that it "arose under strikingly similar facts." The cases were not in fact strikingly or otherwise similar, since *Wisconsin-Michigan* concerned only an initial sale at wholesale, and not a subsequent sale. Further, the fact of interstate energy in the sales in *Wisconsin v. Federal Power Commission,* supra, was conceded, whereas in the case at bar it has neither been conceded nor proved.

II. THE DECISION BELOW, IF PERMITTED TO STAND, WILL PRESERVE THE JURISDICTION WHICH CONGRESS GAVE TO FEDERAL POWER COMMISSION.

1. Facts of Case Necessarily Restrict Applicability of Decision Herein.

The lawful jurisdiction of FPC extends, as Congress intended that it should, over every sale at wholesale in interstate commerce which is not subject to regulation by the States (Sec. 201(a)), i.e., to every such sale where there is a conflict of interest between the states. Many wholesale sales do involve the interests of more than one state, and generalizations and dicta in the cases cited in I, *supra*, must be considered as such in this frame of reference as well as with regard to their factual context.

However, there is no national interest or conflict of states' interest in *this* sale, nor is any asserted by petitioners. The sale with which petitioners are concerned bears no resemblance to prospective sales from FPC's envisioned multi-state power pools. Assuming, as did the Court below, that there is a component of interstate energy in Edison's sale to Colton, such energy is bought by Edison from Hoover Dam, a Federal installation, at rates prescribed by the Federal government. Here we do not have a situation such as was presented in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) where the Court quotes at page 680 from *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682 (1946):

> " 'Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of cost which must be covered by rates charged subsequent purchasers

of gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed'."

Edison is the only company which buys energy from the United States at Hoover and thereafter sells it for use in a single state. The other allottees are either public agencies, exempt from regulation, or private companies selling energy in more than one state. Since Edison has customers only in California its resales are only in California. The California Commission effectively regulates the local rates as Congress intended that it should. The initial sale at wholesale being regulated at the Federal level, and the local sales at the State level, there are no "unreasonable charges" to become "perpetuated . . . in fixed items of cost which must be covered by rates charged subsequent purchasers." *(Phillips Petroleum Company, supra)* and the "subsequent purchasers" are accorded the protection, and the type of protection by California, which Congress intended that they should have. There is no national interest in such a sale, no "Attleboro gap," and no encroachment upon but rather a preservation of the jurisdiction given by Congress to FPC to regulate wholesale sales where there is a national interest.

No "cloud upon the [Federal Power] Commission's authority" is created by the test provided in the decision below, as asserted by FPC. A "clear and certain boundary between federal and state jurisdiction to regulate interstate sales of power" (310 F.2d at 795) may readily be drawn. As stated by Edison in

its Brief in Opposition herein: once there has been a federally-regulated sale for resale of energy which is to be consumed wholly within one state, subsequent sales of that energy within the state of ultimate consumption involve the interest only of that state.

2. The Decision of the Court Below Gives Effect to the Intent of Congress.

California respectfully submits that the decision of the Court below gives effect to uncontradicted and reiterated expressions of the Congressional intent that matters of local concern should be regulated at the local level.

In 1928 the Boulder Canyon Project Act was enacted (45 Stat. 1057, 43 USC §617). With relation to wholesale sales made from Hoover Dam, Section 6 of the Act provides in part:

> "... The *Secretary of the Interior* shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting ... maintenance of a system of accounting, control of rates and service *in the absence of State regulation* or interstate agreement .... He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer ...." (Emphasis added.)

Neither FPC nor Colton disputes that, prior to the enactment of Part II of the Federal Power Act in 1935, jurisdiction to regulate the rates of sales of

allottees (sales subsequent to the initial sale by the United States to such allottees) of electric energy generated at Hoover Dam was vested in the state where the sales occurred if such state had a regulatory agency, otherwise in the Secretary of the Interior.

This enactment followed the *Attleboro* decision in 1927, over the protests of the Federal Power Commission that "all other power projects under Federal jurisdiction are administered by the FPC." (*Hearings on Boulder Canyon Project Act Bill before the Senate Committee on Irrigation,* 69th Cong., 1st Sess., Dec. 1925.)

In 1935, Part II of the Federal Power Act was passed, giving to FPC in the public [national] interest jurisdiction over the sale of electric energy at wholesale in interstate commerce, "such regulation, however, to extend only to those matters which are not subject to regulation by the States". (Sec. 201(a).) Sec. 201(b) provided, among other matters, that FPC "shall not have jurisdiction . . , over facilities . . . used in local distribution . . . ."

Colton contends that the Federal Power Act must have repealed the earlier Boulder Canyon Project Act by implication, yet in 1940 the Boulder Canyon Adjustment Act was enacted which specifically amended Section 6, leaving intact the portion authorizing control of rates by the Secretary of the Interior in the absence of state regulation for resale of Hoover power by its allottees. In 1956 Congress enacted the Colorado River Storage Project Act (43 USC 620h) which reaffirmed the Boulder Canyon Project Act.

The Natural Gas Act (15 USC 717) as originally enacted in 1938 contained no declaration of intent similar to that in Section 201(a) of the Federal Power Act. In 1954 Congress found it necessary to supply this intent by enacting the Hinshaw amendment (15 USC 717(c)) which did not purport to change the act but to clarify it.

The Congressional history makes this abundantly clear:

> "The purpose of this legislation is to *clarify* the Natural Gas Act by further defining the limits of Federal Power Commission's jurisdiction with respect to operations of companies engaged in the local distribution within a State of out-of-State natural gas which has been received by such a company at or within the State borders.
>
> "In making this clarification the *legislation reaffirms and is thoroughly consistent with the original intent of the Congress in enacting the Natural Gas Act; namely, that the act was to supplement, and not supplant State regulation.*
>
> • • • • • •
>
> "The difficulty giving rise to the need for this bill is that *under certain interpretations of the Federal Power Commission,* principally the interpretation upheld by the Supreme Court in the East Ohio case [338 U.S. 464, 70 S.Ct. 266] the Commission has undertaken regulation of some activities of certain companies engaged in the distribution of natural gas whose operations take place wholly within a single State and which can be completely regulated by the respective States. This has resulted in unnecessary duplication of State and Federal jurisdiction, and has caused

> extra expense to individual companies because of overlapping requirements regarding the filing of reports and information. This bill eliminates this duplication by leaving the jurisdiction over these companies exclusively in the States, *as always has been intended.*" (U.S. Code Congressional Administrative News, 83rd Congress Second Session 1954 Vol. 2, p. 2102. (Emphasis added.))

The decision below gives effect to the consistent declaration of Congressional intent from 1928 through 1956 that matters of local concern are to be regulated at the local level.

California respectfully submits, furthermore, that cases cited by petitioners which arose under the Natural Gas Act prior to the Hinshaw amendment in 1954 must be reevaluated with that declaration of Congressional intent in mind.

III. THE DECISION OF THE COURT BELOW MAY BE UPHELD ON ANY OF FOUR INDEPENDENT GROUNDS.

The Court below based its decision upon the ground specified in the question listed herein as No. 3. Aside from this, a finding adverse to petitioners on any one of the three grounds presented herein in Questions Nos. 1, 2 and 4, which were extensively briefed and argued in the Court below, would be sufficient independently to sustain the Court's holding.

A brief discussion of grounds Nos. 1, 2 and 4 follows:

Ground 1. There was no competent or substantial proof that there was any out-of-state energy in the sale at wholesale made by Edison to Colton.

In making its finding that energy from Hoover Dam reached Colton, FPC relied solely on the fact of physical connection.

The nonjurisdictional distribution facilities which ultimately supply Colton are supplied from the 220 kv bus at Edison's Highgrove substation through a connection to transformer banks which serve several thousands customers, including Colton. There are three sources of supply, all of which are also connected to the 220 kv bus at Highgrove, only one of which was taken into consideration by FPC in arriving at its decision. That is the transmission line from Hoover Dam via MWD lines to Hayfield and Edison lines to Highgrove. (As stated hereinbefore (Statement, p. 5), the flow of energy now goes in the opposite direction from Edison's California sources of generation to supply MWD lines.) The second line is a transmission line from Edison's Etiwanda (California) steam generators. The third is a transmission line from Edison's Chino (California) substation to Highgrove. (This line is no longer in service.) Any one of the three connections might have been supplying or receiving energy at a given moment. The two California sources of supply were at all times adequate to meet Colton's load, but FPC ignored both of these connections and the adequacy of their supply, finding, in two mutually exclusive alternative theories, that the Hoover connection is near the transformer

banks so that ". . . when any energy from [Hoover] was being delivered to the 220 kv bus, it was necessarily supplying the requirements of the transformer banks [and thus Colton]." (R. 853.) This theory envisions a first-in, first-out approach and presupposes that Hoover energy would go directly to Colton irrespective of the demands or supply of one or the other of the California connections. The other theory treats energy as "mixing" at the 220 kv bus, so that if the requirements of the transformer banks were greater than the supply from the Hoover connection, energy from "other sources" would mix with Hoover energy, and the mixture would retain "the same proportions . . . all the way to Colton." (R. 853.)

California, whose expertise in this matter is entitled to at least as much consideration in this field as is that of FPC, avers that there is no support in the record for either theory. No more than physical connection was shown. FPC's conclusion was mere speculation and conjecture. In *Jersey Central Power and Light Co. v. Federal Power Commission*, 319 U.S. 61, 65-66 (1943), this Court held that connection alone is insufficient proof where alternative sources of supply could have furnished all of the resale customer's requirements.

This basic factual insufficiency was presented both to FPC and the Court below, and the decision below may be upheld on the ground that there is no substantial evidence to support a finding that the sale of energy to Colton was in interstate commerce.

Ground 2. The Federal Power Commission is precluded from regulating the Edison-Colton sale by the provisions of the Boulder Canyon Project Act, 43 USC 617.

This ground has been adequately discussed hereinabove at page 15 and will not be repeated here, except to remark that FPC's Presiding Examiner granted motions to dismiss the proceeding on this ground. FPC reversed him, and the Court of Appeals did not reach this issue. (FPC Petn., App. A, p. 20, N. 2.)

Ground 3. The sale of electric energy to Colton was made over nonjurisdictional local distribution facilities.

Section 201(b) of the Federal Power Act provides in pertinent part that:

> "The Commission . . . shall not have jurisdiction . . . over facilities used in local distribution,"

The Commission held that the facilities used by Edison to serve Colton are not used in local distribution. (R. 854.) There is *no* evidence to support this finding. All of the evidence is to the effect that these lines which go through streets and alleys to serve several thousand local customers at low voltage in and around Colton, as well as Colton itself, are indeed local distribution facilities. FPC held that these facilities are not local distribution facilities because they are used to make a sale at wholesale. (R. 855.) This construction would make the nature of the facilities depend upon the nature of the sales made—an obvious absurdity that renders the exemption meaningless. It ignores *Connecticut Light and Power Co. v. Federal Power Commission*, 324 U.S. 515, 531 (1945), in which this Court held that the local distribution clause must

be given effect as an independent limitation on the Commission's jurisdiction. But FPC also held that even if the facilities were used in local distribution, the Commission has jurisdiction over a *sale* even though made from nonjurisdictional facilities. (R. 856.) This also is erroneous. Rate jurisdiction is confined by Sections 205 and 206 to "public utilities" which are in turn defined by Sec. 201(e) as owners or operators of jurisdictional facilities. That wholesale sales from local distribution facilities were never intended by Congress to be subjected to FPC regulation is borne out by the legislative history:

> "As in the Senate Bill no jurisdiction is given over local distribution of electric energy, and the authority of the states to fix local rates is not disturbed even in those cases where the energy is brought in from another state." H.R. Rep. 1318, 74th Cong., 1st Sess. 27 (1935).

CONCLUSION

The decision of the Court below may be sustained on any one of three independent grounds exclusive of the one upon which the Court based its decision. There is no conflict with other decisions. The narrow application of the decision will serve to help and not to hinder FPC's lawful jurisdiction. The decision of the Court below is without a doubt consonant with the Congressional intent expressed over the period from 1928 to 1956. In addition, even the possibility that Colton may have received out-of-state energy from Edison is now moot. For the foregoing reasons the petitions for writ of certiorari should be denied.

Dated, March, 12, 1963.

Respectfully submitted,

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